

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Review of the Section 251 Unbundling)	CC Docket No. 01-338
Obligations of Incumbent Local)	
Exchange Carriers)	
)	
)	
Implementation of the Local Competition)	CC Docket No. 96-98
Provisions of the Telecommunications Act)	
Of 1996)	
)	
Deployment of Wireline Services Offering)	CC Docket No. 98-147
Advanced Telecommunications Capability)	

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

SBC Communications Inc., for itself and its wholly owned affiliates¹ (“SBC”), submits the following reply comments in response to the Federal Communications Commission’s (“Commission”) Further Notice of Proposed Rulemaking (“FNPRM”) released in the above-captioned proceeding.²

In an effort to convince the Commission to retain the pick-and-choose rule, CLECs regurgitate the very same arguments they made in 1996, when the Commission implemented the existing pick-and-choose rule in the *Local Competition Order*.³ Seven years of experience,

¹ SBC Communications Inc. (“SBC”) files these Comments on behalf of its subsidiaries, Southwestern Bell Telephone, L.P., d/b/a SBC Oklahoma, SBC Missouri, SBC Kansas, SBC Arkansas and SBC Texas, The Southern New England Telephone Company, Nevada Bell Telephone Company, d/b/a SBC Nevada, Pacific Bell Telephone Company, d/b/a SBC California, Illinois Bell Telephone Company, d/b/a SBC Illinois, Indiana Bell Telephone Company Incorporated, d/b/a SBC Indiana, Michigan Bell Telephone Company, d/b/a SBC Michigan, The Ohio Bell Telephone Company, d/b/a SBC Ohio and Wisconsin Bell, Inc. d/b/a SBC Wisconsin.

² Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, et al., *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978 (2003) (“FNPRM”).

³ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, 16137 ¶ 1310 (1996) (“*Local Competition Order*”), aff’d in part and vacated in part sub nom., *Competitive Telecommunications Ass’n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utilities Bd. v. FCC*, 120

however, have shown those rules to have been ill-advised and to have had a chilling effect on the type of negotiations that were supposed to be the cornerstone of the 1996 Act's implementation. With the benefit of this experience, the Commission should reject these arguments and eliminate the pick-and-choose rule unconditionally.

First, the CLEC commenters claim that the pick-and-choose rule is necessary if they are to have a meaningful opportunity to negotiate with ILECs without expending significant resources.⁴ These claims are baseless. Not only do they vastly overstate CLECs' reliance on the pick-and-choose rule, they falsely suggest that ILECs have the incentive and ability to delay interconnection agreement negotiations. The reality is that the pick-and-choose option is one of several methods that are available to CLECs to obtain interconnection agreements on an expedited basis. In SBC territory, the overwhelming majority of CLECs select other options that enable CLECs to avoid lengthy negotiations. For example, between October 1, 2002 and September 30, 2003, SBC executed 477 interconnection agreements with CLECs.⁵ Of those agreements, 228 CLECs adopted an SBC 13-State Agreement,⁶ 54 CLECs exercised their most favored nations rights ("MFN rights") and adopted all of the interconnection, network element and service arrangements ("Arrangement(s)") contained in another carrier's interconnection agreement, and 122 CLECs elected to sectionally adopt Arrangements (i.e., complete sections)

F.3d 753 (8th Cir. 1997), *aff'd* in part and remanded, *AT&T v. Iowa Utilities Bd.*, 525 U.S. 366 (1999), on remand, *Iowa Utilities Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *rev'd* in part, *Verizon Communications, Inc. v. FCC*, 525 U.S. 366 (2002).

⁴ CLEC Coalition Comments at 11-12, PACE and COMPTTEL Comments at 5 and 9-10.

⁵ This data was compiled on November 7, 2003 and includes the following SBC ILEC territories Oklahoma, Missouri, Kansas, Arkansas, Texas, Nevada, California, Illinois, Indiana, Michigan, Ohio and Wisconsin. Over the same time period, SBC executed an additional 65 interconnection agreements with Commercial Mobile Radio Providers (CMRS) and Paging companies.

⁶ SBC processes requests for 13-State Agreements within ten days. In addition, the 13-STATE Agreement affords CLECs, who so desire, uniform provisions across SBC's 13-State region where possible.

contained in approved and effective interconnection agreements. Obviously, the pick-and-choose rule is not the only method CLECs use to avoid lengthy negotiations and/or arbitrations.⁷

Even if delay was an understandable concern in 1996 when CLECs were seeking their first interconnection agreements, it is no longer is an issue at all because most agreements contain an evergreen clause that allows the expiring agreement to remain effective during the renegotiation process and remain effective until the effective date of the successor agreement.

CLEC commenters also suggest that the pick-and-choose rule would work as the FCC intended were it not for the ILECs' harsh interpretation of "legitimately related" terms and conditions.⁸ This is not the case and is a vast oversimplification by the CLEC commenters. As discussed in SBC's initial comments, the pick-and-choose rule is dysfunctional for a variety reasons,⁹ not only because it forecloses give-and-take negotiations across subject matter in an agreement, but also because ILECs carry the burden to prove that any additional terms that the ILECs require to be adopted are "legitimately related."¹⁰ For example, if a CLEC wishes to adopt the UNE Appendix from an approved interconnection agreement, the ILEC must then review that entire agreement to identify any additional provisions that are legitimately related to that UNE Appendix (e.g., which could include UNE provisions added to that agreement via amendment, UNE provisions contained in other sections of the agreement, the General Terms and Conditions ("GTCs") which govern the entire agreement, including the UNE Appendix, and the associated UNE prices set forth in a separate pricing schedule, etc.) This is extremely cumbersome and time consuming given the number of contracts SBC has across its 13-state region which contains arrangements that are subject to adoption in each state. In addition, under

⁷ SBC does not track pick-and-choose requests. However, SBC fully negotiated 65 agreements and arbitrated 8 agreements with CLECs during this time period. Therefore, CLECs could have utilized the pick-and-choose rule to obtain rates, terms and conditions for any of these 73 agreements.

⁸ CLEC Coalition Comments at 13-14; LecStar Comments at 4.

⁹ See SBC Comments at 3-4.

¹⁰ Local Competition Order at ¶ 1315.

the pick-and-choose rule, CLECs may (and some have) request to adopt Arrangements from multiple interconnection agreements in a state to form an agreement with SBC. This requires a significant amount of work on the part of SBC to incorporate the Arrangements from multiple agreements into a cohesive interconnection agreement for the requesting carrier, at a minimum involving updating cross-references and determining which GTCs from the requested agreements should form the basis of the requesting carrier's GTCs. Thus, contrary to the CLECs claims, who advocate that the pick-and-choose rule should remain as it stands today, the rule does not in fact accelerate the negotiations process, but can actually slow it down given the issues associated with administering it.

Indeed, it is not uncommon for CLECs wholly to ignore the requirement that they must adopt all legitimately related terms of an interconnection agreement when they invoke the pick-and-choose rule. Often, they seek to adopt discrete provisions from an agreement without any regard at all for the legitimately related terms, and they purport to take umbrage or file objections when SBC identifies the provisions that are legitimately related to the sought provisions.¹¹ As a case in point, the CLEC Coalition mischaracterizes SBC's attempts to ensure compliance with the rule in its negotiations with KMC and XO as stonewalling.¹² However, their comments fail to mention that KMC strategically selected discrete provisions from several arbitrated interconnection agreements from various states and did not accept the legitimately related provisions as required. The more accurate term that describes this conduct is cherry-picking. Furthermore, the CLEC Coalition's reference to SBC's negotiations with XO did not involve the pick-and-choose rule at all. XO actually attempted to utilize the SBC/Ameritech Merger

¹¹Recently, SBC received a pick-and-choose request from Quick Connect and B&S Telecom, Inc. that included a list of 26 provisions that had been arbitrated from one agreement and 5 discrete provisions from another agreement that they sought to include in their successor interconnection agreements. Interestingly, their request did not propose any of the legitimately related provisions. In addition, for example, some CLECs seek to adopt an individual arbitrated rate from an interconnection agreement in a state (which does not in and of itself constitute an Arrangement available for adoption, but then object to taking the terms and conditions associated with the rate element the CLEC sought to adopt).

¹² CLEC Coalition Comments at 14-15.

Conditions inappropriately to adopt *arbitrated* terms and conditions from an SBC-Illinois interconnection agreement for inclusion in XO's Ohio agreement. However, the merger condition at issue only required SBC to make *voluntarily negotiated* terms and conditions available on a 13 state basis if certain criteria were met. So, SBC's objection was unrelated to the pick-and-choose rule, but was grounded in XO's devious attempt to use the SBC/Ameritech Merger Order as a pretext to port arbitrated terms and conditions.¹³

Finally, the pick-and-choose rule is not necessary to ensure that ILECs adhere to the Act's nondiscrimination requirement despite some commenters claims.¹⁴ The Act ensures that ILECs' interconnection agreements are neither unjustly or unreasonably discriminatory because of the protections provided by § 251 and state oversight of the negotiations process in § 252. Furthermore, if the FCC correctly interprets section 252(i) to require CLECs to adopt all terms and conditions in an agreement, the Commission effectively ensures ILEC compliance with the Act's obligations despite CLECs unsubstantiated allegations that ILECs will insert "poison pills" into agreements to dissuade them from adopting entire agreements. The reality is that CLEC concerns about discrimination are a red herring and what the CLECs really want is to create a springboard to obtain a perpetually growing list of ILEC concessions.

As SBC stated in its comments, the only way to promote voluntary negotiations and innovative deal-making is to ensure that ILECs obtain the benefits of their bargains across the entire agreement. As it stands today, the existing pick-and-choose rule discourages ILECs from making concessions in one part of an agreement in exchange for CLEC concessions in another part of the agreement and is extremely cumbersome to administer. Consequently, the rule itself forces ILECs to approach negotiations in a compartmentalized fashion, e.g. ILECs are generally

¹³ The CLEC Coalition also mischaracterizes the status of KMC's adoption of the SBC/AT&T Indiana interconnection agreement. While KMC elected to adopt the AT&T Indiana agreement, SBC noted that specific terms and conditions, like transit traffic service, are absent from KMC's existing Reciprocal Compensation agreement and are necessary to ensure that the new interconnection agreement includes a comprehensive set of reciprocal compensation terms and conditions.

¹⁴ MCI Comments at 12; PACE and COMPTTEL Comments at 5.

willing to trade UNE provisions for other UNE provisions, but are not free to trade UNE provisions for collocation provisions and even then, there is a risk that an adopting CLEC may not be required by a state commission (if challenged) to adopt all of the legitimately related provisions to the sought Arrangement(s) in the requested agreement. Indeed, the only way to promote innovative give-and-take negotiations that span an entire agreement is to eliminate the pick-and-choose rule and interpret section 252(i) to require a requesting carrier availing itself of its MFN rights to adopt all rates, terms and conditions of an approved interconnection agreement that are available for adoption under section 252(i).

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CERTIFICATE OF SERVICE

I, Regina Ragucci, do hereby certify that on this 10th day of November 2003, Reply Comments of SBC Communications Inc. in CC Docket Nos. 01-338, 96-98 and 98-147 were served first class mail - pre-paid postage to the parties attached.

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